FILED

JUL 20 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-2053

G. CARMAN RIDLAND,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

G. CARMAN RIDLAND,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 21st day of June, 1973, which affirmed a judgment of conviction rendered by a jury before the Honorable Murray I. Gurfein (S.D.N.Y.).

Petitioner was convicted of one (1) count of conspiracy to violate the securities laws (15 U.S.C. 77q, 77X and 18 U.S.C. 371) and five (5) substantive counts of using the mail in connection therewith (15 U.S.C., 77q, 77X and 18 U.S.C. 2).

No Opinion Below

The judgment of conviction of the District Court was affirmed without opinion of the Circuit Court.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 21st day of June, 1973 (Appendix "A", *infra*, p. 15 *id.*). No petition for rehearing has been made to the Circuit Court of Appeals for the Second Circuit; nor have any extensions of time been granted within which to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1) United States Code and Rule 22(2).

Questions Presented

(1.) Whether the trial judge committed reversible error in denying Petitioner's motion for a mistrial by reason of the submission to the jury of Exhibit 40A (Appendix "B", *infra*, p. 17 *id.*) part of which had been excluded therefrom and directed to be masked, but which was not masked and which was exposed to the jury?

(2.) Whether the trial judge committed reversible error thereby, in permitting the jury to speculate that such withdrawal entry of $35,000.00 upon the monthly bank statement of Cadgie Taylor Inc. could have been the source of the alleged $40,000.00 undisclosed cash commission purportedly paid to the underwriters?

(3.) Whether the trial judge committed reversible error thereby, in permitting the jury to speculate that such withdrawal entry corroborated the contention of the prosecution that there was such a $40,000.00 undisclosed cash payment?

(4.) Whether Petitioner was denied a fair trial and due process of law by reason of the undue and overparticipation and intervention of the trial judge in behalf of the prosecution and prosecution witnesses?

(5.) Whether Petitioner was deprived of the effectiveness of counsel and denied a fair trial and due process by reason of the threats by the trial judge to defense counsel?

(6.) Whether Petitioner was denied a fair trial and due process by the summary dismissal of the jury for the evening by the trial judge immediately upon ascertaining that the jury had acquitted one of the co-defendants and had given favorable instructions concerning the Petitioner and other co-defendants?

(7.) Whether such premature action by the trial judge in dismissing the jury for the evening constituted an intrusion into the deliberations of the jury so as to halt the momentum of acquittal which they had exhibited?

Statutes

15 U.S.C. 77q

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(1) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication

in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

15 U.S.C. 77X

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material facts or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Constitutional Amendments

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

The Petitioner was found guilty after a jury trial in the Southern District of New York before Hon. Murray I. Gurfein.

On the 7th day of March, 1974, the Petitioner was sentenced to a term of three (3) years, of which four (4) months shall be spent in a jail or treatment-type institution; the remainder of the term being suspended and the Petitioner placed on probation.

Petitioner's appeal from such judgment of conviction was affirmed on June 21, 1974.

Specifically, the thrust of the charge was that an undisclosed $40,000.00 cash commission was paid to the underwriter of a public offering of Cadgie Taylor, Inc. stock.

The key issue in the case was whether or not the jury believed that such a $40,000.00 undisclosed cash commission had been paid to the underwriter.

There was no direct proof in the case that such monies had come from Cadgie Taylor, Inc., the company that went public.

Indeed, there was no proof that the assets of Cadgie Taylor, Inc. had been diminished by any such undisclosed cash payment.

The petitioner was a principal of Cadgie Taylor, Inc.

Significantly, the indictment did not contain any substantive charge in connection with such alleged $40,000.00 payment.

The government's case was bottomed solely upon the credibility of witnesses who were members of the underwriting firm of Kelly, Andrews and Bradley, viz.: Schiffman, Bassani and Widlitz.

Needless to say, their credibility was strongly attacked. They each admitted their involvement in the instant crime, as well as others.

They testified as to conversations with the co-defendant and original underwriter that they would undertake the underwriting for an extra fee of $40,000.00.

They further testified that they received such payment on *November 5, 1970.*

The prosecution offered a bank statement of Cadgie Taylor, Inc. into evidence, upon which appeared a withdrawal item of $35,000.00 on *November 3, 1970* (two days prior to the alleged receipt by the underwriters of the $40,000.00 undisclosed cash commission). Objection was made thereto and apparently the Court directed such entry to be masked and directed the prosecution not to refer thereto in summation.

No mention thereof was made in summation; however, such exhibit was submitted to jury as it deliberated, but without such entry being masked. As soon as counsel was informed thereof, and while the jury was still deliberating, counsel requested relief from the Court and specifically moved for a mistrial, which was denied.

Thus, the jury had before it an exhibit which had been ordered to be excluded in part and from the exposure of that part, they were permitted to speculate that (a) there was a $40,000.00 cash payment and (b) the $35,000.00 bank withdrawal was the source thereof.

Repeatedly, during the testimony of the principal government witnesses, the judge interrupted and volunteered explanations of various underwriting terms. These interruptions were so numerous that the testimony of the witnesses were submitted to the jury, permeated with the testimony of the judge and inseparable therefrom. The testimony of the judge appeared to be an extension or con-

tinuance of such witnesses' testimony and lent an aura of respectability and credibility to otherwise incredible witnesses. The judge's testimony was in addition to the witnesses' testimony. Petitioner contends that such an invasion of the witness chair by the judge constitutes an abuse of judicial discretion.

On the first day of deliberation, the jury returned to the courtroom and asked for instructions. The Judge instructed the jury that if they found no undisclosed cash payment to the underwriter, they must acquit. At the same time the jury reported that they had already decided to acquit one of the co-defendants but were still deliberating as to the fate of the petitioner and the other co-defendant; whereupon the judge summarily discharged the jury for the evening. Petitioner contends that the discharge of the jury before they had the opportunity to apply the judge's instructions, particularly after only having deliberated for a few hours, constitutes an abuse of discretion and an invasion of the jury box, inasmuch as by the time they assumed deliberations on the next morning, the effect, thrust and impact of the judge's response to their question had been dissipated and the momentum of acquittal had been slowed to a hault.

Moreover, upon several occasions during the course of the trial, the judge in the presence of the jury, threatened defense counsel that if counsel asked certain questions, the judge would permit the prosecution to divulge other matters. When counsel thereby refrained from pursuing such information, the jury was left with the impression that counsel did not want the entire story disclosed. Counsel's right to cross-examine was thereby curtailed and the appellant was deprived of the effective assistance of counsel, as well as due process.

In addition, the judge unfairly belittled a defense witness.

Reasons for Granting the Writ

(1) Questions "1" through "3" all relate to the steps which should have been taken by the trial judge to eliminate the prejudicial effect of having the jurors view the unmasked withdrawal entry upon the bank statement.

The jury should have considered only matter that had been admitted into evidence.

A breach of such fundamental principle that the jury may consider only matter which has been received in evidence, "should not be condoned if there is the slightest possibility that harm could have resulted."

In the instant case, there is more than "slight" possibility that harm resulted.

The consideration of such exhibit by the jury could have resulted in either prejudice or the possibility of prejudice to the defendant; thus mandating reversal.

It is probable that the jury considered the withdrawal entry to be the source of the undisclosed cash payment to the underwriter and that the entry influenced their decision and verdict. In such a case, submission of the entry to the jury is more than harmless error and reversal is required.

U.S. v. *Adams,* 385 F2d 548 (2d Cir. 1967);
Osborne v. *U.S.,* 351 F2d 111 (8th Cir. 1965);
U.S. v. *Shafer,* 455 F2d 1167 (5th Cir. 1972);
Dallago v. *U.S.,* 427 F2d 546, U.S. App. D.C. 1969;
Sawyer v. *U.S.,* 303 F.2d 392;
U.S. v. *Grady,* 185 F.2d 273;
U.S. v. *Lewis,* 435 F.2d 421 (U.S. App. D.C. 1970);
Leigh v. *U.S.,* 308 F.2d 345 (D.C. Cir. 1962).

It is imposssible to say that the jury did not consider the objectionable matter and that it did not influence their verdict. Submission of such item is reversible error.

U.S. v. *Ware*, 247 F.2d 698 (7th Cir. 1957), *Sanchez* v. *U.S.*, 293 F.2d 260 (8th Cir. 1961), *U.S.* v. *Dressler*, 112 F.2d 972 (7th Cir. 1940), *Steele* v. *U.S.*, 222 F.2d 628 (5th Cir. 1955).

(2) Questions "4" through "7" relate to the prejudicial conduct of the judge throughout the trial, viz; in intervening with and in the examination and testimony of government's key witness; making statements to counsel in the presence of the jury which were prejudicial to Petitioner and discharging the jury for the evening when the jury indicated an intention to acquit.

These three assignments of error are evidence of partiality on the part of the trial judge.

The trial judge was charged with the responsibility of ensuring such a courtroom atmosphere that the Petitioner would have a fair trial before an impartial judge and jury.

Gomela v. *U.S.*, 146 F.2d 372 (5th Cir. 1944);
U.S. v. *Brandt*, 196 F.2d (2nd Cir. 1952);
Quercia v. *U.S.*, 289 U.S. 466;
U.S. v. *DeSisto*, 289 F.2d 833 (2d Cir. 1961).

Because of the deference in which the jury holds the trial judge, his influence upon the jurors is substantial and often controlling.

U.S. v. *Lanham*, 416 F.2d 1140 (5th Cir. 1969);
U.S. v. *Musgrave*, 444 F.2d 755 (5th Cir. 1971).

Hence the trial judge may not unnecessarily inject himself into the mainstream of the trial or add to the testimony, for then he is assuming the posture of a witness himself.

U.S. v. *Marrapese*, 486 F.2d 918 (2nd Cir. 1973).

He must be on continual guard, because of his power and influence, to avoid any display indicating his fixed opinion as to the guilt or innocence of the accused or express or indicate any opinion as to the credibility or evidence of a witness by holding him out as an expert, or otherwise.

U.S. v. *Grunberger,* 431 F.2d 1062 (2d Cir. 1970); page 1067;
U.S. v. *Guglielmini,* 384 F.2d 602 (2nd Cir. 1967);
U.S. v. *U.S. Persico,* 305 F.2d 534.

In the *U.S.* v. *Nazzaro,* 472 F.2d 302 (2nd Cir. 1973), the Court stated:

> "A judge's participation during trial whether it takes the form of interrogating witnesses, addressing counsel or some other conduct must never reach the point at which it appears clear to the jury that the court believes the accused is guilty."
>
> * * *
>
> "Where the defendant's guilt or innocence rests almost exclusively on the jury's evaluation of the witnesses' demeanor and credibility, we cannot ignore questioning undertaken by a judge which so clearly signals to the jury the judge's partisanship. Even if a judge's interjections are not motivated by a partisan purpose he must not permit even the appearance of such an inference." *U.S.* v. *Curcio,* 279 F2d 681, 682 (2nd Cir. 1960), Cert. denied 364 U.S. 824.

To the same effect are *U.S.* v. *Woods,* 252 F.2d 334 (2nd Cir. 1958), *U.S.* v. *D'Anna,* 450 F.2d 1201 (1971), *U.S.* v. *Jordan,* 454 F.2d 323 (7th Cir. 1971), *U.S.* v. *Green,* 429 F.2d 754 (1970).

The previously cited cases are obvious instances where the judge attempted to add to the evidence. There are,

however, other instances where this is done more subtly. Frequently, a judge may begin questioning a witness, but the number and tenor of the questions may indicate the attitude of the court towards the witnesses and his version of the story. *U.S.* v. *DeSisto,* 289 F.2d 833 (2d Cir. 1961).

Here the impact was even greater. The judge repeatedly volunteered gratuitous explanations throughout the testimony of the key government witness, whose credibility was under sharp attack. The judge's explanations were so entwined with the witness' testimony that the jury was unable to sever one from the other, and consequently, accepted the explanations of the judge as an extension of the witness' testimony. By so doing and by making the witness an expert, the judge substituted his credibility for the lack of the credibility of the witness. The view from the jury box was that the judge and witness spoke as one.

The most significant incident of judicial bias in this case is seen during the questioning of the prosecution witness, Schiffman, and the attempt by the court to add to the testimony of the witness. Adding to testimony, as opposed to clarifying it, is clearly outside the scope of judicial conduct. *Quercia* v. *U.S., supra,* and other cited cases. It also had the impact of creating the impression that the judge believed the prosecution witness. In effect, he was trying to rehabilitate or buttress the testimony of that witness against the attack upon his credibility. These attempts are properly the function of the prosecutor and not of the court. By usurping the prosecution's role, the court aligned itself with the government and lost the semblance of impartiality. *U.S.* v. *Navarro, supra.*

In *U.S.* v. *Fernandez,* 480 F.2d 726 (2nd Cir. 1973), the Court, citing *U.S.* v. *Curcio, supra,* stated that a federal judge not only must not interfere for a partisan purpose; he must not even permit the appearance of such interference.

Although timely objections were made, such conduct by the trial judge constitutes plain error. *Hickory* v. *U.S.*, 160 U.S. 408. *U.S.* v. *Bagby*, 451 F.2d 920 (9th Cir. 1971). *U.S.* v. *Lanham, supra. U.S.* v. *Hoker*, 483 F.2d 359 (5th Cir. 1973).

The cumulative effect of the gratuitous judicial comments, questions and explanations during the course of the trial, negated the appearance of impartiality of the judge and the impartiality of the trial itself.

U.S. v. *Hober, supra, U.S.* v. *De Sisto, supra, U.S.* v. *Guglielmini*, 384 F.2d 602 cert. den. 40 U.S. 820 and *U.S.* v. *Salozar*, 293 F.2d (2nd Cir. 1961) (isolated incident held to constitute sufficient prejudice).

Comments by the court threatening to allow the prosecutor to introduce evidence rebutting that introduced by the Petitioner, cemented in the minds of the jury that the judge considered the Petitioner guilty. It also allowed the jury to speculate that there would be more evidence which they had not heard which could be used against the appellant and the jury was thereby given the impression that the defense was less than candid and that it did not want to disclose all the facts.

On several occasions, the judge informed defense counsel in the presence of the jury, that if counsel desired to ask certain questions, the judge would permit the prosecution to rebut the effect of such questions by permitting certain disclosures. Rather than face such risk, counsel did not pursue such line of questioning. Not only was the right of cross-examination curtailed, but the Petitioner was denied the effective assistance of counsel.

In addition, the trial judge minimized the effectiveness of defense witness Hepola, by belittling her in front of the jury.

The precise timing of the judge in dismissing the jury for the evening, after they had just indicated that they had

decided to acquit one of the co-defendants but were still deliberating as to the petitioner as to whom they had just received favorable instructions would appear to indicate that the judge was displeased with the momentum of acquittal. Prejudice in this instance is very subtle, but nonetheless real. The judge in effect, improperly indicated to the jury that they were mistaken and thereby blocked a quick acquittal.

Conclusion

The issues above discussed as well as the other points of the petitioner's Brief before the Court of Appeals are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRWIN KLEIN, P.C.
Counsel for Petitioner.

July 19, 1974.

Exhibit "A".

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June one thousand nine hundred and seventy-four.

Present:

HON. J. JOSEPH SMITH,

HON. WALTER R. MANSFIELD,

Circuit Judges.

HON. JOHN R. BARTELS,

District Judge.

74-1408

United States of America,

Plaintiff-Appellee,

v.

G. Carman Ridland,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudicated, and decreed that the judgment of said District Court be and it hereby is affirmed.

J. JOSEPH SMITH
J. JOSEPH SMITH,
Circuit Judge,

WALTER R. MANSFIELD
WALTER P. MANSFIELD,
Circuit Judge.

JOHN R. BARTELS
JOHN R. BARTELS,
District Judge.

Exhibit "B".

439a

GOVERNMENT'S EXHIBIT 40A.

FIRST NATIONAL BANK OF ARIZONA

ROSENZWEIG CENTER OFFICE
PHOENIX, ARIZONA

NUMBER

0670-03490 CADGIE TAYLOR CO (Illegible)
C-O BERNICE HEPOLA
PHOENIX AZ 83018

DATE

11 12 70

DATE	DEPOSITS	WITHDRAWALS	(Illegible)
11 03 70	3500000	5000000	6892154
11 05 70	6468	4200000	2685686
11 06 70	2000000		685686
11 09 70	279000		406686
6	15392154	14985468	406686

11 12 70